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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ONE ASSORTMENT OF 89 FIREARMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a gun owner's prior acquittal on criminal charges involving firearms precludes a subsequent in rem forfeiture proceeding against the firearms.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-14a) is reported at 685 F.2d 913. The earlier panel opinion (Pet. App. 15a-29a) is reported at 669 F.2d 206. The opinion of the district court (Pet. App. 31a-44a) is reported at 511 F. Supp. 133. An earlier opinion of the district court (Pet. App. 45a-55a) is reported at 463 F. Supp. 365.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on August 23, 1982. The petition for a writ of certiorari was filed on December 20, 1982, and was granted on February 22, 1983 (J.A. 52). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 924(d) of Title 18 provides:

> Any firearms or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

STATEMENT

1. On March 31, 1977, the United States commenced an in rem civil action in the United States District Court for the District of South Carolina seeking forfeiture to the United States of an assortment of firearms seized on January 20, 1977, by Special Agents of the Bureau of Alcohol, Tobacco and Firearms. The complaint alleged (J.A. 6-7) that the firearms had been used and possessed on January 20, 1977, and prior thereto by Patrick M. Mulcahey while he was engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 923(a). Forfeiture was sought pursuant to 18 U.S.C. 924(d).[1]

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[1] The number of firearms involved in this action has varied somewhat with time. Federal agents seized 105 firearms from Mulcahey's residence on January 20, 1977. Pet. App. 36a. Thirteen of the 105 firearms, however, were found to have been stolen and were subsequently returned to their rightful owners. *Ibid.* The remaining 92 firearms were listed on the

Mulcahey filed a claim for recovery of the firearms and also filed an answer to the forfeiture complaint. In his answer, Mulcahey raised collateral estoppel and res judicata as a bar to the forfeiture. Mulcahey had previously been tried and acquitted of charges that he had been engaged in the business of dealing in firearms without being licensed, in violation of 18 U.S.C. 922(a)(1) and 924(a). *United States* v. *Mulcahey*, No. 77-00013 (D.S.C. Mar. 16, 1977) (Pet. App. 2a). At the criminal trial, the government's evidence showed that Mulcahey had not been issued a license to deal in firearms for the period of July 1, 1975, to March 31, 1977, but that he nevertheless bought and sold significant numbers of firearms on numerous occasions during this period (Pet. App. 33a-35a). Mulcahey testified in his own defense, admitting that he had no license (J.A. 17) and that he had bought and sold firearms during the period set forth in the indictment (J.A. 17-37). He claimed, however, that he had been entrapped into making the illegal firearms transactions (see, *e.g.*, J.A. 17-18, 23-27, 33-34). The trial court thereafter submitted the entrapment defense to the jury (J.A. 45-46). The jury returned a general verdict of not guilty.

On motion of the government in the forfeiture proceeding, the district court, per Judge Hemphill, struck Mulcahey's collateral estoppel and res judicata defenses (Pet. App. 45a-51a). Judge Hemphill noted that a "forfeiture proceeding is remedial in nature and is properly characterized as a civil proceeding"

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original complaint for forfeiture. That complaint was thereafter amended to include an additional automatic pistol, bringing the total to 93. *Id.* at 36a, 45a. Four of these guns were later returned to Mulcahey's wife, leaving 89 guns as the subject of the forfeiture proceeding. *Id.* at 36a.

(*id.* at 47a). Because of the difference in the burden of proof between civil and criminal actions, the court concluded that Mulcahey's acquittal on the criminal gun control charge " 'is not a bar to the civil administrative action by the government, which is remedial in nature, arising out of the same facts on which the criminal proceeding was based' " (Pet. App. 51a, quoting *Epps* v. *Bureau of Alcohol, Tobacco & Firearms*, 375 F. Supp. 345, 346 (E.D. Tenn. 1973); emphasis omitted).

The parties had previously stipulated that, in lieu of live testimony, the transcript of the prior criminal trial would be submitted to the court disposing of the forfeiture action (Pet. App. 2a). Upon reviewing that transcript, Judge Simons, to whom the case had been reassigned, found that Mulcahey had indeed bought and sold significant quantities of ammunition and numerous firearms without a federal license (*id.* at 33a, 39a). In agreement with Judge Hemphill's previous order in the case, Judge Simons held that a forfeiture proceeding under 18 U.S.C. 924(d) is remedial in nature and is properly characterized as a civil proceeding (Pet. App. 37a). After an extensive analysis of Mulcahey's activities, he concluded that the government had proved by a preponderance of the evidence that Mulcahey had been engaged in the business of dealing in firearms and ammunition without the required federal license (*ibid.*).[2] The firearms

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[2] Judge Simons found that the government's evidence "clearly establishes that during an eight-month period from May 13, 1976, to January 20, 1977, [Mulcahey] did engage in the business of dealing in firearms without being licensed to do so" (Pet. App. 38a). The court summarized Mulcahey's firearms transactions as follows (*ibid.*):

> (a) seven purchases of firearms on four separate occasions;

owned by Mulcahey that were used or intended to be used in violation of 18 U.S.C. 922(a)(1) were therefore found subject to forfeiture under 18 U.S.C. 924(d).[3]

(b) three offers to purchase a firearm * * * on three separate occasions;

(c) three sales of firearms on three separate occasions;

(d) seventeen offers to sell firearms (at least nine different firearms) on four occasions.

The court noted that Mulcahey "exhibited a marked inability to recall the date he acquired the seized firearms, from whom and how these firearms were acquired, and the purchase price or other things of value given * * * in exchange for each firearm" (Pet. App. 38a). The seized firearms and the guns bought and sold by Mulcahey, moreover, were "of the sort commonly dealt in by licensed dealers" (*id.* at 39a), and three or four of the transactions shown by the government involved "the same type of firearm" (*ibid.*). Mulcahey had purchased six Ruger Mini 14, .223 caliber rifles between August 21, 1976, and December 3, 1976, yet only three of these rifles "remained among those firearms seized pursuant to the warrant on January 20, 1977" (*ibid.*). The court found this "to be strong evidence of dealing in firearms, rather than collecting" (*ibid.*). Mulcahey, furthermore, held himself out as a firearms dealer when he required a government agent to fill out a federal firearms form prior to the purchase of a handgun (*id.* at 41a; J.A. 21-22). The court concluded that Mulcahey's "own statements, his course of dealing, and the wealth of circumstantial evidence in the record prove by a preponderance of the evidence that he used or intended to use all of the firearms he personally possessed as an inventory to be drawn from in the course of dealing in firearms, in violation of 18 U.S.C. § 922(a)(1)" (Pet. App. 42a-43a).

[3] The court ordered the forfeiture of 80 firearms. Nine firearms were found to be the property of various members of Mulcahey's family (Pet. App. 36a) and were not included in the forfeiture order (*id.* at 43a-44a).

2. A divided panel of the court of appeals reversed (Pet. App. 15a-29a). Relying on *Coffey* v. *United States*, 116 U.S. 436 (1886), the panel held that the forfeiture action was barred by Mulcahey's criminal acquittal because the criminal action involved "the identical facts" of the forfeiture proceeding and the "essential elements" of the forfeiture action had therefore been resolved against the government (Pet. App. 22a).

Chief Judge Winter dissented (Pet. App. 23a-29a). He concluded (*id.* at 23a) that while "*Coffey* holds that a subsequent *criminal* forfeiture is barred by an earlier acquittal on criminal charges arising out of the same facts," more recent Supreme Court decisions "compel the conclusion that the forfeiture in the present case is civil." A subsequent civil action, Judge Winter reasoned, is not barred by a criminal acquittal "because the standards of proof in criminal and civil proceedings are different" (*ibid.*). Relying on *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), *Murphy* v. *United States*, 272 U.S. 630 (1926), and *Stone* v. *United States*, 167 U.S. 178 (1897), Judge Winter concluded that "if the forfeiture proceeding is civil in nature," res judicata does not bar the civil action, and "the standard of proof argument, by itself, is enough to defeat any resort to collateral estoppel" (Pet. App. 24a). Judge Winter noted that the rationale adopted by the majority was rejected in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), because the forfeiture provision at issue in that case was found to be civil in nature. He contended that similar reasoning controlled in this case. "The forfeiture statute here, 18 U.S.C. § 924(d), was manifestly designed to aid in the enforcement of gun control laws by preventing the circulation of firearms which had been illegally obtained. *One Lot Emerald*

Cut Stones thus compels the conclusion that the forfeiture at issue here is civil in nature, so that the double jeopardy and res judicata claims must be rejected. It matters not, despite the majority's views, that the necessary allegations in the criminal proceeding and the forfeiture proceeding were identical" (Pet. App. 27a; footnote omitted).

3. On rehearing en banc the court of appeals adhered to the panel decision by a 5-4 vote (Pet. App. 1a-14a). The majority again specifically relied on *Coffey* and rejected the government's argument that a prior criminal acquittal does not bar a subsequent civil forfeiture proceeding (*id.* at 3a-5a). The majority reasoned that the "issue of whether the firearms were used or intended to be used in violation of the [Gun Control] Act was tried in [the criminal prosecution] and conclusively decided" (*id.* at 7a). The court further concluded that the sanction at issue here is criminal in nature, relying on the fact that the forfeiture provision is contained in 18 U.S.C. (& Supp. V) 924 and "[e]verything in § 924 provides a penalty, be it fine, prison or forfeiture, for the violation of a provision of the Gun Control Act" (Pet. App. 9a-10a). The court distinguished *Helvering* v. *Mitchell* and other Supreme Court precedent providing for civil penalties subsequent to a criminal acquittal on the ground that "[t]here is nothing remedial about forfeiture under § 924(d)" (Pet. App. 10a).

Judge Winter, joined by three others, again dissented. Relying in large part on the analysis of his dissent at the panel stage, Judge Winter also noted that the "majority errs when it confidently asserts that the jury verdict in the criminal action conclusively settled the issue that Mulcahey was not engaged in the business of dealing in firearms without a li-

cense" (Pet. App. 13a). Because of Mulcahey's assertion of entrapment, "it is equally possible that the jury found that Mulcahey was engaged in the business of dealing in firearms without a license, but had been entrapped into commiting an illegal sale, as [that it] found that Mulcahey was not so engaged" (*ibid.*). Judge Winter also remained convinced that "the forfeiture provisions of 18 U.S.C. § 924(d) are civil in nature so that *any* determination in the criminal prosecution is irrelevant to a decision of forfeiture" (Pet. App. 13a; emphasis in original). This conclusion is reinforced, Judge Winter reasoned, by the fact that the forfeiture provision is significantly broader in scope than the criminal sanctions of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (Pet. App. 13a-14a). Section 924(d) provides "disjunctively that 'Any firearm involved in or used or *intended to be used* in, any violation of this chapter * * * shall be subject to seizure and forfeiture * * *' (emphasis added). * * * Nothing in the provision of § 922 under which Mulcahey was prosecuted renders an *intention* to engage in the business of dealing in firearms without a license illegal" (Pet. App. 13a-14a; footnote omitted).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 924(d) of Title 18 of the United States Code provides for the seizure and forfeiture of "[a]ny firearm or ammunition involved in or used or intended to be used in, any violation of [federal gun control law]." Relying solely on *Coffey* v. *United States*, 116 U.S. 436 (1886), the court of appeals ruled that an acquittal on criminal firearms charges bars a subsequent forfeiture action under 18 U.S.C. 924(d), notwithstanding the fact that forfeiture actions under Section 924(d) have traditionally been subject to the

preponderance of evidence standard of proof rather than the much stricter criminal standard. Although the doctrinal basis for its preclusion rule is unclear, the lower court's decision rests on the premise that "[t]he criminal verdict conclusively decided that the firearms * * * were not 'involved in or used or intended to be used in the violation'" of federal law (Pet. App. 8a). This factual resolution, the court concluded, is binding on all subsequent judicial proceedings involving the firearms and bars the forfeiture action here.

The premise and conclusion of the court of appeals conflict with controlling legal precedent and are faulty as a matter of logic. An acquittal, of course, establishes only that the government has not shown beyond a reasonable doubt that certain facts exist; it does not "conclusively" establish (Pet. App. 7a, 8a) that those facts do not exist. *Helvering* v. *Mitchell*, 303 U.S. 391, 397 (1938). The decisions of this Court, therefore, clearly hold that a criminal acquittal does not bar a subsequent "civil action requiring a different degree of proof." *Helvering*, 303 U.S. at 405. The court of appeals, in apparent recognition of this rule, concluded that a forfeiture under 18 U.S.C. 924(d) is neither "civil" (Pet. App. 12a) nor "remedial" (*id.* at 10a). This determination, however, is at odds with the longstanding view that in rem forfeiture actions are civil penalties (*Helvering*, 303 U.S. at 400; *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 580-581 (1931)), and with the explicit conclusion of numerous other circuits that 18 U.S.C. 924(d) embodies a remedial, civil sanction. *E.g.*, *Glup* v. *United States*, 523 F.2d 557, 561 (8th Cir. 1975).

It is beyond serious dispute that a *civil* action is not barred by a prior criminal acquittal involving the

same conduct, whether the asserted ground for preclusion be identified as res judicata, double jeopardy, collateral estoppel, or the decision in *Coffey*. See *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235-237 (1972); *Helvering*, 303 U.S. at 397-406. The actual bone of contention in this litigation, therefore, is whether 18 U.S.C. 924(d) imposes a civil or criminal penalty. See *United States* v. *Ward*, 448 U.S. 242, 248 (1980). The decisions of this and other courts, however, clearly indicate that the forfeiture provision at issue here was designed as a remedial, civil measure to remove dangerous weapons from unregulated channels of commerce. *Huddleston* v. *United States*, 415 U.S. 814, 824-825 (1974). Congress provided civil procedures for enforcing the sanction, and forfeiture itself is not so punitive in purpose or effect as to require classification as a criminal penalty.

The fact that some proprietary forfeitures can be termed "quasi-criminal," moreover, does not support the decision below. Although this Court has applied the "quasi-criminal" label in determining whether the fundamental protections against unreasonable searches and seizures and self-incrimination apply to forfeiture proceedings (*United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965); *Boyd* v. *United States*, 116 U.S. 616 (1886)), those cases simply do not transform forfeiture proceedings into criminal actions for all constitutional and procedural purposes. *Ward*, 448 U.S. at 251-255; *One Lot Emerald Cut Stones*, 409 U.S. at 237.

ARGUMENT

I. THE DECISION IN *COFFEY* v. *UNITED STATES* DOES NOT COMPEL PRECLUSION OF A CIVIL FORFEITURE ACTION FOLLOWING A CRIMINAL ACQUITTAL

The decision of the en banc court below rests squarely upon a single aged precedent—*Coffey* v. *United States*, *supra*. *Coffey* is, however, a slender reed upon which to hang the entire weight of the preclusion rule fashioned by the court of appeals. Indeed, the more recent opinions of this Court demonstrate that the broad preclusion doctrine announced in *Coffey* no longer retains independent vitality.

The Court in *Coffey* held that a forfeiture action brought against certain distilling equipment was barred by the owner's prior acquittal on charges of removing and concealing distilled spirits with the intent to defraud the revenue.[4] The Court found that "where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*" (116 U.S. at 443).

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[4] The statute at issue in *Coffey* provided that whenever any person engaged in the distilling business "defraud[s] * * * the United States of the tax on the spirits distilled by him * * * he shall forfeit the distillery and distilling apparatus * * * and shall be fined * * * and be imprisoned" (116 U.S. at 437).

The *Coffey* Court experienced some difficulty in explicating the rationale behind the broad rule of preclusion announced by the case. Although the Court had concluded in a pair of earlier decisions that nominally civil penalty proceedings, brought subsequent to a criminal acquittal, were barred by double jeopardy considerations (*United States* v. *Chouteau*, 102 U.S. 603, 611-612 (1881); *United States* v. *Ulrici*, 102 U.S. 612 (1881)), the *Coffey* Court did not cite those cases or explicitly ground its opinion on Fifth Amendment principles. Rather, the Court appeared to base its decision on notions of collateral estoppel. The Court did note that one argument against giving a criminal acquittal preclusive effect was the fact that an acquittal "may have taken place because of the rule requiring guilt to be proven beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States * * *" (116 U.S. at 443). But it nevertheless concluded that the differing standards of proof between a criminal prosecution and a civil forfeiture action did not prevent preclusion because "the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant" (*ibid.*).

Coffey has remained something of an enigma, because the Court did not specify the legal foundation for the preclusion rule developed in the opinion. Was the forfeiture action barred by res judicata? Collat-

eral estoppel? Double jeopardy? Subsequent courts and commentators have been uncertain. See generally 1B J. Moore & T. Currier, *Moore's Federal Practice* ¶ 0.418[3] (2d ed. 1982); Annot., 27 A.L.R.2d 1137, 1138-1140 (1953).[5] See also *United States* v. *One Dodge Sedan*, 113 F.2d 552, 553 (3d Cir. 1940) (collecting numerous cases and law review articles criticizing *Coffey*). The decision can be read broadly as precluding any subsequent court action brought by the government that is based upon the same "act[s] or fact[s]" (116 U.S. at 443) involved in a prior criminal prosecution. The decision can also be read considerably more narrowly, as precluding only the imposition of criminal punishments following a criminal acquittal. See, *e.g.*, 116 U.S. at 443 ("all that is imposed by the statute, as a consequence of guilt, is a punishment therefor"). Compare *United States* v. *La Franca*, 282 U.S. 568, 572, 575 (1931) (civil suit brought to collect a tax for the illegal sale of liquor is precluded by a prior criminal *conviction* because the tax was held to be merely an additional "punishment for infraction of the law"). Although the court of appeals adopted a broad reading of *Coffey*, the decisions of this Court since 1886 have plainly restricted the case to the narrow grounds just stated.

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[5] "Neither the Coffey case nor subsequent cases applying its rule appear to have decided whether it is founded upon broad res judicata principles or upon the rules as to double jeopardy or autrefois acquit. The difference in the burden of proof imposed upon the government in the two proceedings, and at least technical differences in the parties and issues, logically preclude an application of res judicata; and if double jeopardy is relied upon, it is difficult to explain the numerous cases holding that a prior conviction is no bar to a subsequent forfeiture." 27 A.L.R.2d at 1139 (footnotes omitted).

One Lot Emerald Cut Stones, 409 U.S. at 235; *Helvering*, 303 U.S. at 405-406; *Murphy* v. *United States*, 272 U.S. 630, 631-632 (1926); *Stone* v. *United States*, 167 U.S. 178, 186-187 (1897).

In *Helvering* v. *Mitchell*, the Court was faced with an action to recover a substantial monetary penalty for fraudulent avoidance of income tax. The defendant argued that his prior acquittal on charges of willfully attempting to evade and defeat the tax precluded the subsequent penalty action. The court of appeals, relying principally on *Coffey*, agreed and held that the penalty action was precluded (see 303 U.S. at 396). This Court, in an opinion by Justice Brandeis, reversed.

The defendant in *Helvering* advanced three basic arguments: (1) that the second penalty action was barred by "res judicata" (apparently used in a broad sense as including collateral estoppel, see 303 U.S. at 397); (2) that the penalty action was barred by the Double Jeopardy Clause (*id.* at 398); and (3) that the *Coffey* decision required preclusion (*id.* at 405). The Court rejected each argument.

The res judicata and collateral estoppel arguments were quickly dispatched by the *Helvering* Court. The Court simply reversed the position taken in *Coffey* and concluded that differences between the burdens of proof in criminal and civil actions do prevent application of res judicata or collateral estoppel to civil suits brought following a criminal acquittal. Compare 116 U.S. at 443 with 303 U.S. at 397. See also *United States* v. *$2,500 in United States Currency*, 689 F.2d 10, 15 (2d Cir. 1982) (*Helvering* "reject[s] the holding of *Coffey*"). "The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*.

The acquittal was 'merely * * * an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.' * * * That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled." *Helvering*, 303 U.S. at 397. See also *One Lot Emerald Cut Stones*, 409 U.S. at 235 ("the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel"); *Murphy* v. *United States*, *supra*, 272 U.S. at 632-633 ("the judgment in the criminal case does not make the issues in the present [civil case] *res judicata*"); *Stone* v. *United States*, *supra*, 167 U.S. at 188 ("In the criminal case [the petitioner's] acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action * * * might have been sufficient to entitle the Government to a verdict").

The *Helvering* Court similarly rejected the defendant's double jeopardy argument on the ground that the second penalty action was civil, not criminal, in nature. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission * * *. The question for decision is thus whether [the second action] imposes a criminal sanction." 303 U.S. at 399. Using an analysis quite similar to the one employed in more recent decisions of this Court (*e.g.*, *Ward*, 448 U.S. at 248, 250), the *Helvering* Court concluded that "[f]orfeiture of goods or their value or the payment of fixed or variable sums of money" are civil sanctions because they have

historically been "enforcible by civil proceedings" (303 U.S. at 400). See also *Various Items of Personal Property* v. *United States*, *supra*, 282 U.S. at 581 (Fifth Amendment's Double Jeopardy Clause does not apply to in rem forfeitures).

Finally, the *Helvering* Court rejected the notion that *Coffey* mandated preclusion of the second suit. The Court stated flatly that "the rule of the *Coffey* case '[does] not apply to a situation where there ha[s] been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof' " (303 U.S. at 405). See also *United States* v. *$8,850*, No. 81-1062 (May 23, 1983), slip op. 5, 14 (Court remands civil forfeiture action for further proceedings notwithstanding claimant's prior acquittal on criminal charges involving the property subject to forfeiture); *One Lot Emerald Cut Stones*, 409 U.S. at 237 (same). As Judge Winter correctly noted in his original dissent from the panel opinion, *Coffey* bars only a "subsequent criminal forfeiture * * * arising out of the same facts" as an earlier criminal acquittal (Pet. App. 23a).[6] *Coffey* therefore does not—contrary to the apparent conclusion of the court of appeals (Pet. App. 7a)—bar all judi-

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[6] This is the sole aspect of the *Coffey* decision that has any continuing vitality today. One need not, however, reach as far back as *Coffey* for expressions of the above rule. See, *e.g.*, *Ashe* v. *Swenson*, 397 U.S. 436, 445-447 (1970) (collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy); *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148, 148-152 (suit brought to recover monetary penalty following conclusion of a criminal prosecution is civil in nature and does not violate a defendant's double jeopardy rights); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-550 (1943) (same).

cial inquiry into the "same act[s] or fact[s]" (116 U.S. at 443) that were the subject of a criminal prosecution. *Coffey* demands preclusion only where a subsequent penalty proceeding is properly deemed to be criminal in nature. 1B J. Moore & T. Currier, ¶ 418[3], at 2856.

II. FORFEITURE UNDER 18 U.S.C. 924(d) IS A CIVIL, REMEDIAL PENALTY

Because the decisions of this Court unequivocally establish that a criminal acquittal does not preclude a subsequent civil action founded on the same facts, the crucial question in this case is whether forfeiture under 18 U.S.C. 924(d) is a civil, remedial penalty. Based on two rather limited considerations, the court below concluded that 18 U.S.C. 924(d) is neither. The court reasoned that forfeiture under Section 924(d) is not "civil" because it "is a part of the 'Penalties' section of the law" (Pet. App. 9a). It next concluded that there is nothing "remedial" about the statute because following forfeiture the "firearms are destroyed" (*id.* at 10a). See 26 U.S.C. 5872(b). This perfunctory analysis is plainly insufficient. The fact that forfeiture is listed as a "penalty" is not, of course, determinative of whether it is a civil or a criminal penalty. Moreover, the fact that forfeited firearms are sometimes destroyed does not negate the remedial congressional purpose behind the forfeiture itself. A more balanced and careful analysis leads to a result directly opposite to the court of appeals' conclusion.

"This Court has often stated that the question whether a particular statutorily-defined penalty is civil or criminal is a matter of statutory construction." *Ward*, 448 U.S. at 248. See also *One Lot*

Emerald Cut Stones, 409 U.S. at 237; *Helvering*, 303 U.S. at 399. The Court's inquiry in this regard has "traditionally proceeded on two levels." *Ward*, 448 U.S. at 248. First, the Court has sought to determine whether Congress "indicated either expressly or impliedly a preference for one label or the other" (*ibid.*). Second, when Congress has indicated its intention to establish a civil penalty, the Court has inquired "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention" (*id.* at 248-249). This analysis plainly indicates the civil, remedial nature of the forfeiture penalty established by Section 924(d).

A. The Procedures for Executing a Forfeiture Under 18 U.S.C. 924(d) and the Rationale Behind the Sanction Itself Evidence Congress' Intent to Create a Civil, Remedial Penalty

1. Forfeitures "have been recognized as enforcible by civil proceedings since the original revenue law of 1789." *Helvering*, 303 U.S. at 400. The historical roots of modern in rem forfeiture actions, as well as the express legislative structure of 18 U.S.C. 924(d), evidence the undeniably civil nature of the forfeiture action at issue here.

The historical origins of the law of forfeiture were most recently traced by this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-690 (1974). In the course of that opinion, the Court noted that early English law provided for two basic types of forfeiture: forfeiture resulting from "conviction for felonies and treason," and "statutory forfeitures of offending objects used in violation of the customs and revenue laws" (416 U.S. at 682). Forfeiture based upon a felony conviction, a form of forfeiture that has not been generally adopted into

American law (see U.S. Const. Art. III, § 3; 18 U.S.C. 3563; Rev. Stat. 5326 (1874 ed); 1 Stat. 117)), "did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).[7] Statutory forfeitures, by contrast, were enforced in the Court of Exchequer by means of civil in rem procedures operating directly against the item to be forfeited. *Calero-Toledo*, 416 U.S. at 682. The item to be forfeited was "considered as the offender," and the proceeding in rem stood "independent of, and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 25 U.S. at 14-15. Unlike forfeitures based upon conviction of a felony, moreover, statutory forfeitures became a part of American jurisprudence "'[l]ong before the adoption of the Constitution'" (*Calero-Toledo*, 416 U.S. at 683, quoting *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943)) and have been consistently regarded as civil proceedings, separate and apart from any criminal prosecution. Indeed, precisely because a statutory in rem forfeiture "is no part of the punishment for the criminal offense," this Court has held that "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply" to in rem forfeiture actions (*Various Items of Personal Property* v. *United States*, 282 U.S. 577, 581 (1931)), and the "innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense" (*Calero-Toledo*, 416 U.S. at 683).

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[7] The "convicted felon forfeited his chattels to the Crown and his lands escheated to his lord," while the "convicted traitor forfeited all of his property, real and personal, to the Crown" (*Calero-Toledo*, 416 U.S. at 682).

Congress was certainly aware of this history when it enacted 18 U.S.C. 924(d). Although Section 924 lists forfeiture as a "penalty," the congressional reports on the legislation reflect Congress' knowledge of the distinction between traditional criminal sanctions and the in rem forfeiture penalty provided by Section 924(d). Both the Senate and House reports state that Section 924 "contains the penalty and forfeiture provisions," clearly indicating that Congress was cognizant of the fact that an in rem statutory forfeiture "is no part of the punishment for the criminal offense." *Various Items of Personal Property* v. *United States*, *supra*, 282 U.S. at 581.[8]

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[8] Where Congress has intended to create a criminal rather than a civil in rem forfeiture, it has expressly provided for such a result. The Racketeer Influenced and Corrupt Organizations Act (RICO), for example, contains both civil (18 U.S.C. 1964) and criminal (18 U.S.C. 1963) penalties, with forfeiture listed as a criminal penalty contingent upon conviction (18 U.S.C. 1963(a)). The legislative reports on RICO, furthermore, demonstrate Congress' sensitivity to the distinction between criminal forfeitures and civil in rem forfeitures. As the Senate report noted (S. Rep. No. 92-617, 91st Cong., 1st Sess. 79-80 (1969)):

> The concept of forfeiture as a criminal penalty which is embodied in [Section 1963(a)] differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is *in rem* against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense * * *
>
> Under the criminal forfeiture of section 1963 * * * the proceeding is *in personam* against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or im-

Congress' intent that Section 924(d) be regarded as a civil rather than a criminal penalty is most clearly evidenced, however, by the procedural mechanisms it established for enforcing forfeitures under the statute. Section 924(d) does not prescribe the steps to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code of 1954.[9] The Internal Revenue Code provides that proceedings to enforce forfeitures "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made" (26 U.S.C. 7323). As outlined above, in rem actions are, by their very nature, civil proceedings, with jurisdiction dependent upon seizure of a physical object, in contrast with the in personam nature of criminal actions. See *Calero-Toledo*, 416 U.S. at 684.

In addition to the in rem nature of the action, the Internal Revenue Code provides a summary, administrative proceeding for forfeiture of seized goods

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prisonment, but also by forfeiture of all interest in the [RICO] enterprise.

See also *United States* v. *McManigal*, No. 82-1754 (7th Cir. May 19, 1983), slip op. 20 ("the forfeiture of a portion of a person's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of [RICO]"); 1 C. Wright, *Federal Practice & Procedure* § 125.1, at 389 (2d ed.) ("[u]ntil [the passage of RICO] American law did not use the concept of a 'criminal forfeiture' ").

[9] Section 924(d) provides that "all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms" apply to "forfeitures under the provisions of this chapter." Chapter 75, subch. C, Part II of the Internal Revenue Code of 1954 contains the procedural "Provisions Common to Forfeitures." 26 U.S.C. 7321-7328.

valued at $2,500 or less. See 26 U.S.C. 7325 (requiring the filing of a claim and posting of a bond in order to obtain judicial proceedings regarding forfeiture of goods valued at less than $2,500). See also 27 C.F.R. 72.22-72.26 (Bureau of Alcohol, Tobacco and Firearms regulations detailing the procedures for administrative forfeiture of seized firearms). Notice of a seizure under 18 U.S.C. 924(d) may be provided by publication (26 U.S.C. (& Supp. V) 6325; 27 C.F.R. 72.22(a)(3)), and the Bureau of Alcohol, Tobacco and Firearms is empowered to remit or mitigate a forfeiture under the administrative procedures applicable to "forfeitures under the custom laws." 26 U.S.C. 7327; 27 C.F.R. 72.31. See generally *United States* v. *$8,850*, *supra*, slip op. 2-3. Such procedures plainly could not be utilized in a criminal action. "That Congress provided a distinctly civil procedure for [forfeitures under 18 U.S.C. 924(d)] indicates clearly that it intended a civil, not a criminal, sanction." *Helvering*, 303 U.S. at 402.[10]

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[10] In line with the civil procedural rules governing forfeitures under 18 U.S.C. 924(d), it is well established that the government need establish its case only by a preponderance of the evidence. *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). In accordance with cases construing the burden of proof under other federal forfeiture statutes (*e.g.*, *United States* v. *$83,320 in United States Currency*, 682 F.2d 573, 576-577 (6th Cir. 1982) (21 U.S.C. (Supp. V) 881(a)(6)); *United States* v. *$364,960 in United States Currency*, 661 F.2d 319, 324 (5th Cir. 1981) (21 U.S.C. (Supp. V) 881(a)(6)); *United States* v. *One 1974 Porsche 911-S*, 682 F.2d 283, 285 (1st Cir. 1982) (21 U.S.C. 881(a)(4)); *United States* v. *One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 156 (3d Cir.), cert. denied, 454 U.S. 818 (1981) (21 U.S.C. 881(a)(4)); *United States* v. *One 1972 Toyota Mark II*, 505 F.2d 1162, 1164 (8th Cir. 1974) (21 U.S.C. 881(a)(4));

2. The fact that civil rather than criminal procedures apply to a Section 924(d) forfeiture is not the only evidence that the sanction cannot be deemed a criminal penalty. Although the court of appeals found "nothing remedial about forfeiture under § 924(d)" (Pet. App. 10a), the section in fact furthers a broadly remedial aim: the elimination of widespread, unregulated commerce in lethal weapons.

Section 924(d) was first enacted in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Section 901, 82 Stat. 233, which this Court has previously described as a "carefully constructed package of gun control legislation." *Scarborough* v. *United States*, 431 U.S. 563, 570 (1977). See also *Dickerson* v. *New Banner Institute*, No. 81-1180 (Feb. 23, 1983), slip op. 16. Later that same year, Congress strengthened the provisions of Title IV by extending its proscriptions to rifles, shotguns, and ammunition. Gun Control Act of 1968,

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United States v. *$3,799 in United States Currency*, 684 F.2d 674, 678 (10th Cir. 1982) (26 U.S.C. 7302); *United States* v. *Fields*, 425 F.2d 883, 885 (3d Cir. 1970) (49 U.S.C. 782)), two district courts have concluded that once the government has shown probable cause to justify a forfeiture under Section 924(d), the burden of proof shifts to the claimant. *United States* v. *14 Handguns*, 524 F. Supp. 395, 397 (S.D. Tex. 1981); *United States* v. *26 Firearms*, 485 F. Supp. 549, 551 (W.D. Pa. 1980), aff'd, 639 F.2d 777 (3d Cir. 1980) (table). Courts, furthermore, regularly grant summary judgment in favor of the government (*e.g.*, *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975)), and routinely permit the government to appeal from an adverse decision in a forfeiture case—something that would be impermissible if the forfeiture action were "criminal." See, *e.g.*, *United States* v. *Walter*, 638 F.2d 947 (6th Cir. 1981); *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276 (5th Cir. 1980).

Pub. L. No. 90-618, 82 Stat. 1213. Section 924(d) was retained in this later legislation without alteration.

When Congress enacted the 1968 gun control legislation, "it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Huddleston* v. *United States*, 415 U.S. 814, 824 (1974). Congress concluded that "the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States." *Ibid.*, citing S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). The Gun Control Act of 1968, in particular, was designed to "control the indiscriminate flow" of firearms across state borders and to "assist and encourage States and local communities to adopt and enforce stricter gun control laws." H.R. Rep. No. 1577, 90th Cong., 2d Sess. 8 (1968). The 1968 gun control legislation is "thus aimed at restricting public access to firearms." *Huddleston*, 415 U.S. at 824.

As this Court has previously recognized, the "principal agent of federal [gun control] enforcement is the dealer." *Huddleston*, 415 U.S. at 824. All commerce in ammunition and firearms is channeled through federally licensed dealers, "the focus of the federal scheme," in order "to eliminate the mail order and the generally widespread commerce in [firearms], and to insure that, in the course of sales or other dispositions by these dealers, weapons [will] not be obtained by individuals whose possession of them would be contrary to the public interest." *Id.* at 825; *Dickerson* v. *New Banner Institute*, *supra*, slip op. 5. Section 924(d) plays an important role in furthering the "broad prophylactic purpose" of the 1968 gun control legislation (*Dickerson* v. *New*

Banner Institute, supra, slip op. 15) by eliminating stocks of firearms that have been used or intended for use outside regulated channels of commerce.

Firearms that are found subject to forfeiture under 18 U.S.C. 924(d) may be destroyed. See 26 U.S.C. 7326, 5872(b). The court of appeals concluded that this fact demonstrated that Section 924(d) could not be viewed as a remedial sanction (Pet. App. 10a). The possible destruction of forfeited weapons, however, reinforces rather than negates the remedial purpose behind the provision. The forfeiture sanction provided by Congress in Section 924(d) is not merely punitive; it is designed to discourage unregulated commerce in firearms and to remove from circulation firearms that have been either illegally obtained and distributed or set apart for such use. As the Second Circuit has stated, the forfeiture sanction is designed "to keep potentially dangerous weapons out of the hands of unlicensed dealers." *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, 443 F.2d 463, 466 (2d Cir.), cert. denied, 404 U.S. 983 (1971).[11]

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[11] The court of appeals' assertion that forfeited firearms are invariably destroyed (Pet. App. 10a) is not in fact entirely accurate. 26 U.S.C. 7326 provides that forfeited firearms will be disposed of in accordance with the provisions of 26 U.S.C. 5872(b). Section 5872(b) provides that, if there is no administrative remission or mitigation, forfeited firearms will be either destroyed, sold to a state government, or transferred "without charge to any executive department or independent establishment of the Government for use by it." Cf. 41 C.F.R. 101-48.303 (forfeited firearms will not be sold to state governments except as scrap). Thus, contrary to the court of appeals' statement that forfeiture cannot be remedial because the "firearms do not go into the public treasury" (Pet. App.

Section 924(d), finally, is materially broader in scope than the criminal provisions of the 1968 gun control legislation. The criminal provisions of 18 U.S.C. 922 proscribe only completed, specifically delineated acts. For example, 18 U.S.C. 922(a)(1), the section under which Mulcahey was indicted, outlaws only the completed act of engaging in the business of dealing in firearms without a license. By contrast, the forfeiture sanction reaches firearms that are merely "intended to be used" in violation of the law. Section 924(d), therefore, reaches a broader range of conduct than the criminal provisions of the gun control act, and that breadth "is persuasive evidence that Congress did not intend forfeitures to be an additional penalty for the commission of a criminal act but rather that they be a separate civil sanction, remedial in nature" (Pet. App. 14a, Winter, C.J., dissenting). Section 924(d) was designed to remove dangerous goods from illegal channels of commerce, and the court of appeals' narrow, contrary construction of the section is not "consonant with the achievement of [the] congressional objective [behind the 1968 gun control legislation]" (*Huddleston*, 415 U.S. at 825).

3. Consistent with the above analysis, at least six circuits have concluded that 18 U.S.C. 924(d) embodies a civil sanction.[12] Because of the civil nature

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10a), forfeited firearms may, in a very real sense, " 'reimburse the Government for the heavy expense of investigation' " of a gun control violation (*ibid.*, quoting *Helvering*, 303 U.S. at 401) since the federal government can and does use the forfeited firearms.

[12] *United States* v. *16,175 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns*, *supra*, 443 F.2d at 466; *United States* v. *One Assortment of Seven Firearms*, 632 F.2d

of an in rem forfeiture proceeding, these cases recognize that the government's burden under Section 924(d) "is to establish its case by a preponderance of the evidence." *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980). The decisions, moreover, reflect the fact that Section 924(d)'s remedial civil forfeiture sanction was designed by Congress to reach activities outside the criminal provisions of the 1968 Gun Control Act. See, *e.g.*, *United States* v. *One Assortment of Seven Firearms*, 632 F.2d 1276, 1278 (5th Cir. 1980) (because Section 924(d) reaches firearms that are merely "intended to be used" in violation of federal gun control law, forfeiture may be ordered even where no actual criminal violation occurs). While none of the above cases undertakes an analysis as extensive as the one set out in this brief, the unanimous conclusion of six courts of appeals that Section 924(d) provides a civil penalty is persuasive evidence that the forfeiture in this case is not, as the court below concluded, "criminal in nature" (Pet. App. 9a). To the contrary, as the Eighth Circuit stated in *Glup* v. *United States*, *supra*, 523 F.2d at 561, "[i]t is well established that a forfeiture proceeding under 18 U.S.C. § 924(d) is remedial in nature and is properly characterized as a civil proceeding." [13]

1276, 1278 (5th Cir. 1980); *United States* v. *Walters*, 638 F.2d 947, 950 (6th Cir. 1981); *United States* v. *One Heckler-Koch Rifle*, 629 F.2d 1250, 1251 (7th Cir. 1980); *United States* v. *Various Firearms*, 523 F.2d 47, 48 (7th Cir. 1975); *Glup* v. *United States*, 523 F.2d 557, 561 (8th Cir. 1975); *United States* v. *86 Firearms*, 623 F.2d 643, 644 (10th Cir. 1980).

[13] In *Glup*, the owner of an assortment of firearms forfeited under Section 924(d) brought an action to recover the weapons following his acquittal on criminal firearms charges. The court

B. Forfeiture Under Section 924(d) is not so Punitive in Purpose or Effect as to Require Classification as a Criminal Penalty

The procedures prescribed by Congress for executing forfeitures under Section 924(d) and the congressional purpose behind the sanction all evidence Congress' intent that 18 U.S.C. 924(d) be classified as a civil rather than a criminal penalty. The sanction, moreover, is not "so punitive either in purpose or effect as to negate that intention" (*Ward*, 448 U.S. at 249).

Whether a nominally civil remedy in reality imposes a criminal penalty is rarely self-evident. The Court has rightly noted that "sometimes it is hard to

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of appeals held that forfeiture was proper notwithstanding the acquittal because "[n]one of the six counts on which appellant was acquitted involved the previously forfeited firearms" (523 F.2d at 561). In dictum, however, the court addressed the precise issue presented by this case, concluding that even if the criminal trial and the forfeiture action had involved the same firearms, the criminal acquittal would not affect the civil forfeiture action (*ibid.*). At least one district court has likewise held that a forfeiture under 18 U.S.C. 924(d) may follow an acquittal on related criminal gun control charges. *United States* v. *One Assortment of 12 Rifles & 21 Handguns*, 313 F. Supp. 641, 642 (N.D. Fla. 1970). Several other district courts have so stated in dictum. *United States* v. *26 Firearms*, 485 F. Supp. 549, 551 (W.D. Pa. 1980), aff'd, 639 F.2d 771 (3d Cir. 1980) (table) ("Forfeiture has been awarded even where there was an acquittal on the underlying violation of criminal statutes"); *United States* v. *Ten Firearms and Twenty-Four Rounds of Ammunition*, 444 F. Supp. 305, 308-309 (N.D. Tex. 1977) (acquittal on criminal gun control charges does not bar forfeiture under Section 924(d)); *United States* v. *57 Miscellaneous Firearms*, 422 F. Supp. 1066, 1070 n.2 (W.D. Mo. 1976) ("[i]t is even possible to suffer a civil forfeiture under 18 U.S.C. 924(d) if the defendant stands trial and is acquitted on the criminal charge").

say how a given detriment imposed by the law shall be regarded." *Murphy* v. *United States, supra*, 272 U.S. at 632. The mere fact that a certain sanction "is imposed in consequence of a crime is not conclusive" (*ibid.*), because " '[p]unishment, in a certain and very limited sense, may be the result of [any] statute * * * so far as the wrong-doer is concerned,' but this is not enough to label it as a criminal statute." *U.S. ex rel. Marcus* v. *Hess, supra*, 317 U.S. at 551, quoting *Brady* v. *Daly*, 175 U.S. 148, 157 (1899).

The Court, therefore, has traditionally considered a variety of factors in determining whether a particular civil sanction is so punitive in purpose or effect as to require treatment as a criminal penalty. Although the Court has not developed an "exhaustive" or "conclusive" catalogue of the factors that are relevant in such an inquiry (*Ward*, 448 U.S. at 250), the considerations set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), have been found pertinent in making this analysis.[14] See *Ward*, 448 U.S. at 255-257 (Blackmun, J., concurring); *Bell* v. *Wolfish*, 441 U.S. 520, 539-540 (1979). A careful study of these factors demonstrates that 18 U.S.C.

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[14] Those factors include (372 U.S. at 168-169; footnotes omitted):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned * * *.

924(d) should not be classified as a criminal penalty. Indeed, of the seven *Mendoza-Martinez* factors, only one—whether or not the proscribed conduct is already a crime—lends any support to the proposition that 18 U.S.C. 924(d) imposes a criminal penalty.

Forfeiture under 18 U.S.C. 924(d) does not impose an "affirmative disability or restraint" within the meaning of *Mendoza-Martinez*, 372 U.S. at 168. This first criterion for analyzing whether an act of Congress is civil or criminal in nature was drawn by the *Mendoza-Martinez* Court from *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), where the Court concluded that the statutory termination of social security benefits because of past membership in the Communist Party did not involve an "affirmative disability or restraint" (*ibid.*). The reasoning in *Nestor* compels an analogous result in this case. Forfeiture, like the termination of social security benefits, does not approach the " 'infamous punishment' of imprisonment" (*Flemming* v. *Nestor*, *supra*, 363 U.S. at 317). Compare *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896) (imprisonment at hard labor). Furthermore, while it may involve hardship similar to that involved in *Nestor*, a proprietary forfeiture does not have the stigmatizing effect of a criminal conviction or result in a marked restriction of personal liberty.[15] Forfeiture

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[15] The declaration of a forfeiture under Section 924(d) does not render the prior possessor of the forfeited firearms a "criminal" or engender the disabilities commonly associated with a criminal conviction. A forfeiture order, for example, does not preclude a gun owner from possessing firearms in the future. Cf. 18 U.S.C. 922(h)(1) (persons convicted of "a crime punishable by imprisonment for a term exceeding one year" may not receive any firearm that has been shipped in interstate commerce).

under Section 924(d), therefore, does not evidence an unduly punitive intent on the part of Congress.[16]

The second factor noted by the Court in *Mendoza-Martinez*—whether a particular sanction "has historically been regarded as a punishment" (372 U.S. at 168)—plainly demonstrates the civil nature of Section 924(d). The forfeiture sanction provided by Section 924(d) is a "traditional[] * * * civil remedy." *Ward*, 448 U.S. at 256 (Blackmun, J., concurring). Proprietary forfeitures, unlike the historically punitive sanction of exile involved in *Mendoza-Martinez* (see 372 U.S. at 168 n.23) and the similarly criminal penalties at issue in the other cases cited by the *Mendoza-Martinez* Court on this point,[17] have histori-

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[16] In addition to *Flemming* v. *Nestor*, the *Mendoza-Martinez* Court cited two other cases to illustrate the phrase "affirmative disability or restraint." *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *United States* v. *Lovett*, 328 U.S. 303 (1946). *Garland* involved an ex post facto enactment and *Lovett* a prohibited bill of attainder, both of which were designed to " 'punish [an] individual for past activity,' " rather than regulate " 'a present situation, such as the proper qualifications for a profession' " (*Flemming* v. *Nestor*, *supra*, 363 U.S. at 614, quoting *DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960)). The punitive intent of the legislature appears to have been the controlling factor in each case. *Flemming* v. *Nestor*, *supra*, 363 U.S. at 615-616. Cf. *Bell* v. *Wolfish*, *supra*, 441 U.S. at 539 n.20 (certain restrictions on the liberty of pretrial detainees "may on [their] face appear to be punishment," although they may in fact be incidents of a lawful nonpunitive governmental objective).

[17] *Wong Wing* v. *United States*, *supra*, 163 U.S. at 235, 237; (imprisonment at hard labor); *Ex parte Wilson*, 114 U.S. 417, 426-429 (1885) (same); *Mackin* v. *United States*, 117 U.S. 348, 350-351 (1886) (same); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866) (exclusion from a profession by means of a bill of attainder).

cally been classified as civil sanctions. As this Court stated in *Helvering*, 303 U.S. at 400 (citations omitted):

> Forfeiture of goods or their value and the payment of fixed or variable sums of money are * * * sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. * * * In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions.

In light of this history, it is unlikely that Congress thought it was utilizing a civil cloak to obscure a criminal penalty when it enacted 18 U.S.C. 924(d).

In contrast to most criminal penalties, forfeiture under Section 924(d) does not "come[] into play only on a finding of *scienter*" (*Mendoza-Martinez*, 372 U.S. at 168). Indeed, there is no scienter requirement at all for forfeitures under 18 U.S.C. 924(d). *United States* v. *16,175 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns, supra*, 443 F.2d at 466; *United States* v. *14 Handguns*, 524 F. Supp. 395, 398 (S.D. Tex. 1981); *United States* v. *57 Miscellaneous Firearms*, 422 F. Supp. 1066-1071 (W.D. Mo. 1976). Nor is the primary function of the statute to "promote the traditional aims of punishment—retribution and deterrence" (*Mendoza-Martinez*, 372 U.S. at 168). Although it may reasonably be anticipated that the prospect of a proprietary forfeiture will deter some individuals from violating federal gun control law, the deterrent or retributive aspects of a Section 924(d) forfeiture are no more pronounced than the unquestionably civil forfeitures at issue in *One*

Lot Emerald Cut Stones, supra, and *Various Items of Personal Property* v. *United States, supra.*[18]

In any event, and whatever the deterrent effect of Section 924(d), the statute plainly has an "alternative purpose" apart from the promotion of "the traditional aims of punishment" (*Mendoza-Martinez,* 372 U.S. at 168). Section 924(d) furthers the broad prophylactic goals of the Gun Control Act of 1968 by removing firearms from unregulated channels of commerce. See *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns, supra,* 443 F.2d at 466. And while the elimination of stocks of firearms that were intended for illegal distribution may result in some personal hardship for their prior owners, that fact alone is insufficient to render Section 924(d) penal in nature. As Justice Frankfurter stated in his concurring opinion in *United States* v. *Lovett,* 328 U.S. 303, 324 (1946): "The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for the deprivation." Section 924(d) is designed to make widespread, unregulated commerce in firearms impossible, and that purpose is unrelated to the pun-

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[18] The two cases cited in *Mendoza-Martinez* regarding retribution and deterrence (372 U.S. at 168) involved a monetary penalty far in excess of what could reasonably be related to any remedial purpose (*United States* v. *Constantine,* 296 U.S. 287 (1935)), and the loss of citizenship based upon a court martial conviction for deserting an Army post for less than one day (*Trop* v. *Dulles,* 356 U.S. 86 (1958)). In contrast to these cases, Section 924(d) does not impose a sanction entirely disproportionate to the misconduct triggering the penalty.

ishment of any individual gun dealer, collector, or purchaser.

Forfeiture, finally, is not "excessive" in relation to the remedial purpose of Section 924(d) (*Mendoza-Martinez*, 372 U.S. at 169). In fact, the sanction in this case could hardly be any more closely tied to the remedial goal of Section 924(d): removal of firearms from illicit circulation.

Although the factors delineated in *Mendoza-Martinez* "may often point in different directions" (372 U.S. at 169), the above considerations indicate a single conclusion: 18 U.S.C. 924(d) is civil rather than penal in nature. The sole *Mendoza-Martinez* factor that lends any support to the court of appeals' conclusion that 18 U.S.C. 924(d) is "criminal in nature" (Pet. App. 9a) is that much of "the behavior to which it applies is already a crime" (*Mendoza-Martinez*, 372 U.S. at 168). This Court, however, has previously found that this factor is not of controlling significance. *Ward*, 448 U.S. at 250.

The fact that civilly penalized conduct may also be a crime "seems to point toward a finding that [a particular sanction] is criminal in nature." *Ward*, 448 U.S. at 250. But, because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission" (*Helvering*, 303 U.S. at 399), "that indication is not as strong as it seems at first blush" (*Ward*, 448 U.S. at 250). See *One Lot Emerald Cut Stones*, 409 U.S. at 235. Indeed, Congress regularly imposes parallel civil and criminal penalties on specified activities precisely to afford a broad range of governmental responses to prohibited conduct. See, *e.g.*, 18 U.S.C. 1964 (setting forth civil remedies in addition to criminal penalties for violation of RICO); 18 U.S.C. 287 and 31 U.S.C. 231 (criminal and civil penalties for presenting "false, fictitious, or fraudu-

lent" claims against the government); 29 U.S.C. 666 (criminal and civil penalties for violation of the Occupational Safety and Health Act of 1970); 42 U.S.C. (& Supp. IV) 5410 (criminal and civil penalties for violation of Mobile Home Construction and Safety Standards Act of 1974); 30 U.S.C. (Supp. V) 820 (criminal and civil penalties for violation of coal mine health and safety standards); 30 U.S.C. (Supp. V) 1268 (criminal and civil penalties for violating any permit issued under the Surface Mining Control and Reclamation Act of 1970); 16 U.S.C. (& Supp. V) 1540 (criminal and civil penalties for violation of the Endangered Species Act of 1973). In some contexts, the civil penalties may even prove as effective as the criminal ones in deterring future misconduct. See, *e.g.*, 15 U.S.C. 15 (treble damage provision of the Clayton Act). Therefore, in analyzing the possible penal nature of a nominally civil sanction, whether or not particular conduct is already a crime gains importance only where there is some substantial additional basis for concluding that Congress specifically intended the civil sanction in question to be additional punishment for engaging in the proscribed conduct.[19]

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[19] See, *e.g.*, *United States* v. *LaFranca*, *supra*, 282 U.S. at 572-573 ("the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law"); *United States* v. *Constantine*, *supra*, 296 U.S. at 295 ("Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct"). To what extent those cases survive *Helvering* is uncertain, but their continuing vitality is surely limited to rather egregious circumstances.

There is no basis in this case for concluding that Congress intended Section 924(d) to operate as a penal sanction. As noted earlier (page 26, *supra*), Congress purposefully drafted Section 924(d) to reach a broader range of conduct than is proscribed by the criminal provisions of the 1968 Gun Control Act. Because the sanction embodied in Section 924(d) is not limited to criminal misconduct (*United States* v. *One Assortment of Seven Firearms*, *supra*, 632 F.2d at 1278), there is no reason to assume that Congress "intend[ed] forfeiture[] to be [a criminal] penalty" (Pet. App. 14a, Winter, C.J., dissenting). Congress did not enact Section 924(d) primarily to "impose a penalty as a deterrent and punishment for unlawful conduct" (*United States* v. *Constantine*, *supra*, 296 U.S. at 295), and the fact that the section may apply to some conduct that *is* a crime "does not mandate characterization of [this] proceeding as 'criminal'" (*Ward*, 448 U.S. at 257 (Blackmun, J., concurring)). To the contrary, inasmuch as the "other [*Mendoza-Martinez*] factors weigh in the opposite direction" (*ibid.*), the civil, remedial nature of 18 U.S.C. 924(d) is readily apparent.

III. THE FACT THAT FORFEITURE PROCEEDINGS ARE "QUASI-CRIMINAL" FOR SOME CONSTITUTIONAL PURPOSES DOES NOT COMPEL PRECLUSION OF THE PRESENT ACTION

Forfeiture proceedings have in some contexts been labelled "quasi-criminal" because their object is to penalize through civil processes the commission of offenses against the law. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965), citing *Boyd* v. *United States*, 116 U.S. 616, 633-634 (1886). In *Boyd* the Court went so far as to state (116 U.S. at 634) that forfeitures, "though they may be civil in

form, are in their nature criminal." The court of appeals, relying on this dictum, concluded that forfeiture under 18 U.S.C. 924(d) is "criminal in nature and the prior jury verdict is a bar to the present proceeding" (Pet. App. 9a). The decision in *Boyd*, however, simply will not support such a broad conclusion, as is clear from the analysis in *Ward*. See 448 U.S. at 251-255.

In *Boyd*, the petitioners had been indicted for fraudulently attempting to deprive the United States of certain customs duties on imported merchandise, under a statute that called for forfeiture of the imported property as well as a fine and imprisonment. 116 U.S. at 617. While the criminal indictment was pending, petitioners filed a claim for the goods held by the United States. The prosecution, in response, obtained a district court order requiring petitioners to produce the invoice covering the goods in question. Petitioners objected to this order on the ground that it subjected them to an unreasonable search and seizure and violated their Fifth Amendment self-incrimination rights. This Court, in ruling on those contentions, concluded that civil suits for "penalties and forfeitures" are "quasi-criminal" in nature and are therefore "within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself * * *" (116 U.S. at 634).

This Court has subsequently enforced the above precise holding of *Boyd*. See, *e.g.*, *Lees* v. *United States*, 150 U.S. 476 (1893) (monetary penalty proceeding is sufficiently criminal to trigger the self-incrimination clause of the Fifth Amendment); *One*

1958 Plymouth Sedan v. *Pennsylvania*, *supra* (Fourth Amendment exclusionary rule applies to state proceeding for the forfeiture of an automobile allegedly involved in the illegal transportation of liquor); *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971) (self-incrimination clause of the Fifth Amendment applies to a proceeding by the United States to secure forfeiture of money found in the possession of a gambler at the time of his arrest).[20] "This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd*, noting on at least one occasion that '[s]everal of *Boyd*'s express or implicit declarations have not stood the test of time.'" *Ward*, 448 U.S. at 253, quoting *Fisher* v. *United States*, 425 U.S. 391, 407 (1976). One such assertion in *Boyd* that has never been accorded its "full scope" (*ibid.*) is the statement that forfeitures "are in their nature criminal" (116 U.S. at 634).

Read literally, the dictum in *Boyd* relied upon by the court of appeals (Pet. App. 9a) would require the wholesale application of criminal procedural and constitutional law to in rem forfeiture actions. But the subsequent decisions of this Court have stopped far short of such a result. "In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have

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[20] While *Boyd*'s extension of Fourth Amendment search and seizure and Fifth Amendment self-incrimination rights to "penalty and forfeiture" actions remains more or less intact, the substantive content of those rights has been altered dramatically since 1886. Indeed, so far as *Boyd*'s Fourth and Fifth Amendment analysis is concerned, "[i]t would appear that * * * the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." *Fisher* v. *United States*, 425 U.S. 391, 408 (1976), citing *Bellis* v. *United States*, 417 U.S. 85 (1974).

usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced." *Helvering*, 303 U.S. at 400 n.3. Thus, in *United States* v. *Regan*, 232 U.S. 37 (1914), the Court declined to hold that the government must prove its case beyond a reasonable doubt in order to collect a civil monetary penalty—even though the Court had previously held that a similar statute triggered the Fifth Amendment's self-incrimination clause. *Lees* v. *United States*, *supra*. "*Boyd* and *Lees*, according to *Regan*, were limited in scope to the Fifth Amendment's guarantee against compulsory self-incrimination, which 'is of broader scope than are the guarantees in Art. III and the Sixth Amendment governing trials and criminal prosecutions.'" *Ward*, 448 U.S. at 253, quoting *United States* v. *Regan*, *supra*, 232 U.S. at 50. Similarly, in *Hepner* v. *United States*, 213 U.S. 103 (1909), the Court upheld the entry of a directed verdict in favor of the United States under the predecessor to the statute involved in *Regan*. According to *Hepner* (213 U.S. at 112), "the *Lees* and *Boyd* cases do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense." Recent decisions of this Court, of course, similarly recognize the essentially civil nature of in rem forfeiture actions. *One Lot Emerald Cut Stones*, 409 U.S. at 232; *Helvering*, 303 U.S. at 400.

Boyd and its progeny may be taken to establish that the Fourth Amendment's protections against unreasonable searches and seizures and the Fifth Amendment's self-incrimination privilege have some

application to certain penalty and forfeiture actions. These cases do not, however, require across-the-board application of criminal procedural and constitutional rights to any case that can be loosely labelled "quasi-criminal." [21] The only issue raised by *Boyd* in this case, therefore, is whether forfeiture under 18 U.S.C. 924(d) is "so far criminal in [its] nature" (*Ward*, 448 U.S. at 253) as to trigger the double jeopardy clause of the Fifth Amendment.[22] The short answer to this question is that this Court has already determined that "[t]he provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply" to in rem forfeiture actions (*Various Items of Personal Property* v. *United States*, *supra*,

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[21] A probation revocation proceeding, for example, is almost certainly "quasi-criminal," yet the federal courts have held that, notwithstanding possible Fourth Amendment concerns, the exclusionary rule is not applicable to probation revocation proceedings. See, *e.g.*, *United States* v. *Frederickson*, 581 F.2d 711, 713 (8th Cir. 1978) (per curiam); *United States* v. *Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975); *United States* v. *Farmer*, 512 F.2d 160, 162-163 (6th Cir.), cert. denied, 423 U.S. 987 (1975); *United States* v. *Brown*, 488 F.2d 94, 95 (5th Cir. 1973) (per curiam); *United States* v. *Hill*, 447 F.2d 817, 819 (7th Cir. 1971); *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161, 1163 (2d Cir. 1970) (parole revocation). See also *Ballard* v. *State*, 595 P.2d 1302 (Utah 1979) (acquittal of motorist charged with driving under the influence of alcohol is not a bar to administrative revocation of the motorist's driver's license).

[22] Double jeopardy is the only constitutional doctrine that could conceivably bar a civil forfeiture action following a criminal acquittal, because the government has never been required to meet the reasonable doubt standard in a civil penalty action [see *United States* v *Regan*, *supra*] and "the difference in the burden of proof in criminal and civil cases [therefore] precludes application of the doctrine of collateral estoppel." *One Lot Emerald Cut Stones*, 409 U.S. at 232.

282 U.S. at 581) because "Congress may impose both a criminal and a civil sanction in respect to the same act or omission" (*Helvering*, 303 U.S. at 399). As developed above, 18 U.S.C. 924(d) provides a civil, remedial sanction, and nothing in *Boyd* or the cases applying *Boyd* suggests that a prior criminal acquittal on gun control charges precludes the government from enforcing the civil forfeiture at issue here.

The decision of the court of appeals is somewhat obscure, in that it is not entirely clear whether the court believes the forfeiture action in this case is barred by res judicata, double jeopardy, collateral estoppel, or some generalized rule of preclusion emanating from *Coffey* v. *United States*, *supra*. Whatever the foundation for the decision, however, it is pellucidly clear that a criminal acquittal does not, on any of the above grounds, pretermit a subsequent civil, remedial action. *One Lot Emerald Cut Stones*, 409 U.S. at 235-237; *Helvering*, 303 U.S. at 397-405; *Murphy* v. *United States*, *supra*, 272 U.S. at 631-632; *Stone* v. *United States*, *supra*, 167 U.S. at 186-187. Congress enacted Section 924(d) for the remedial purpose of eliminating dangerous weapons from unregulated channels of commerce, and it provided civil procedures for enforcement of the section. Forfeiture, moreover, is not an unduly punitive sanction; indeed, Section 924(d) does not impose a disability any more harsh than the forfeiture at issue in *One Lot Emerald Cut Stones* or the stiff monetary penalty involved in *Helvering*. In these circumstances, the court of appeals plainly erred in concluding that a gun owner's prior acquittal on criminal firearms charges bars a subsequent civil in rem action against the firearms.

CONCLUSION

The judgment of the court of appeals should be reversed.

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